No. 94-109

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1994

NAEGELE OUTDOOR ADVERTISING, INC.,
PETITIONER,

v.

CITY OF DURHAM,
RESPONDENT

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Fourth Circuit

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

In arguing against review of the decision below, Durham does not take issue with many of the propositions advanced in the petition for a writ of certiorari. The City does not deny that the issues presented here are important and recurring ones. Nor does it deny that the courts of appeals are in disarray on the nature of the First Amendment rules governing outdoor advertising. Moreover, Durham makes only the most halfhearted attempt to defend the merits of the court of appeals' Fifth Amendment holding. And for the reasons explained below, the arguments that the City does advance against review are insubstantial.

A. The First Amendment Issue in This Case Warrants Review

1. Durham acknowledges that this Court's decision in *Metromedia, Inc.* v. *City of San Diego*, 453 U.S. 490 (1981) "produced a confusing welter of opinions" and that "lower court decisions under *Metromedia* * * * have not been uniform." Br. in Opp. 9. The City insists, however, that the courts of appeals have disagreed only in their analysis of the sorts of restrictions that may be imposed on *noncommercial* speech. *Id.* at 9-12. This assertion is wrong.

We explained in the petition (at 12-13) that, for example, the decision below cannot be reconciled with the Third Circuit's holding in *Rappa* v. *New Castle County*, 18 F.3d 1043 (3d Cir. 1994), which adopted a rule — applicable to noncommercial as well as commercial signs — requiring that content-based exceptions to a general ban on signs be "significantly related to the particular [geographical] area in which the sign is viewed — for example, a sign identifying the property on which it sits." *Id.* at 13. Durham attempts to distinguish *Rappa* on the ground that "[t]he actual result in *Rappa*, invalidation of an ordinance that prohibited political advertising, * * * is consistent with the result in the instant case." Br. in Opp. 12. But this argument entirely ignores the Third Circuit's reasoning in *Rappa*, which turned on the conclusion that content discrimination in the regulation of signs may be justified only "when there is a significant relationship between the content of particular speech and a specific location or its use." 18 F.3d at 1065.[1] The Third Circuit was quite explicit in concluding that

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[1] In addition, Durham's description of the "actual result" in *Rappa* as simple invalidation of "an ordinance that prohibited political advertising" is incorrect. In fact, the statute at issue in *Rappa* was very similar to the Durham Ordinance, banning *all* signs except those that fell within seven stated exceptions — some permitting specified forms of commercial and some permitting specified forms of noncommercial speech. See 18 F.3d at 1066-1068. Compare Pet. App. 63a-67a (Durham Ordinance). The Third Circuit assessed the constitutionality of each of these exceptions (18 F.3d at 1066-1068) and held the ordinance *as a whole* unconstitutional because "at least one of the exceptions — the exception for signs advertising local cities, industries, and meetings — is for signs that are not

application of its rule has nothing to do with whether the speech at issue is commercial or noncommercial,[2] and Durham pointedly does *not* suggest that its Ordinance would satisfy the Third Circuit's test.

Similarly, Durham itself acknowledges that there is "some inconsistency" between the decision below and that of the Ninth Circuit in *Outdoor Systems, Inc.* v. *City of Mesa*, 997 F.2d 604 (9th Cir. 1993). Br. in Opp. 12. In fact, the analysis of the Fourth and Ninth Circuits is irreconcilable. As we explained in the petition (at 16 n.11), the Ninth Circuit in *Outdoor Systems* upheld the sign codes challenged there only because "[t]he codes do not discriminate between commercial and noncommercial speech and thus do not run afoul of the principle enunciated in *Discovery Network*." 997 F.2d at 611. The Durham Ordinance, which

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significantly related to the specific location where the signs are placed or [their] use." *Id.* at 1068. See *id.* at 1079. It is undeniable that the general exception to the Durham sign ban for noncommercial signs fails the Third Circuit's test because it is "not significantly related to the specific location where the signs are placed"; application of the Third Circuit's approach therefore plainly would lead to invalidation of the Durham Ordinance.

[2] In explaining the application of its test the court provided both commercial and noncommercial illustrations, declaring:

> A sign that says "Speed Limit 55" or "Rest Stop" is more important *on a highway* than is a sign that says "Rappa for Congress." A sign identifying a commercial establishment is more important on its premises than is a sign advertising a related project. If the former signs are banned from the highway or the place of business, there is no other means of communication that can provide equivalent information. In contrast, placing a sign that says "Rappa for Congress" or "Drink Pepsi" on a highway, while it might be an important means of communication because of the number of travellers on the highway, has no relationship to the property on which it is placed or to the fact that it is next to a highway. Banning these signs potentially leaves many alternative means of communicating the same information.

18 F.3d at 1064 (emphasis in original) (footnote omitted).

explicitly *does* discriminate between commercial and noncommercial speech, plainly could not survive application of the principle recognized in *Outdoor Systems* to be controlling.

2. In the petition, we also contended (at 13-15) that review of the First Amendment issue presented here is in order to resolve the clear tension between the plurality opinion in *Metromedia* (relied upon by the court below) and the Court's more recent decision in *City of Cincinnati* v. *Discovery Network, Inc.*, 113 S. Ct. 1505 (1993). Durham does not deny that this tension exists or that it will be a source of enormous confusion for the lower courts, and it makes no attempt to reconcile the decisions.[3]

Durham does contend that the holding below may be reconciled with *Discovery Network*, arguing that, while there was no substantial justification for the Cincinnati regulation at issue in that case, there is a close fit between the City's means and ends here because its Ordinance will eliminate a substantial percentage of the off-premise signs in the City. Br. in Opp. 13-16. But even assuming that such a fit between means and ends would validate otherwise unconstitutional content-based discrimination, Durham is able to reach its conclusion only by artificially restricting the universe of signs to be examined for "fit" to those directly regulated by the Ordinance. In so doing, the City simply disregarded many other signs that give rise to precisely the sorts of esthetic and safety concerns that assertedly justify the Ordinance, including the many off-premise signs located along interstate and

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[3] Instead, Durham relies on *City of Ladue* v. *Gilleo*, 114 S. Ct. 2038 (1994), for the proposition that "the Court recognizes the importance of offering special protection to noncommercial speech." Br. in Opp. 15. But if the City means by this that *City of Ladue* justifies discrimination between commercial and noncommercial speech, it is misreading that decision. While the Court there held that the First Amendment prohibited a municipal ban on certain political signs, it simply did not reach "the separate question whether it was improper for the City simultaneously to *permit* certain other signs." 114 S. Ct. at 2044 (emphasis in original). That, of course, is the question presented here. While the Court cited *Discovery Network* for the proposition that content discrimination is suspect (see *id.* at 2044), the Court had no occasion in *City of Ladue* to comment on the scope of the holding in *Discovery Network*.

federally aided highways, and the hundreds of distracting and obtrusive on-premise signs in the City. Durham's ban on commercial signs that "are no more harmful" than the highway and on-premise signs that are permitted — a ban that the City has not established will have anything more than "an inconsequential effect on the esthetic values with which the City is concerned" (*City Council of Los Angeles* v. *Vincent*, 466 U.S. 789, 812 (1984); see *Lindsey* v. *City of San Antonio*, 821 F.2d 1103, 1110 (5th Cir. 1987)) — accordingly is "an insufficient justification for the discrimination." *Discovery Network*, 113 S. Ct. at 1511.[4] At a minimum, as we argue in the petition (at 17), the case should be remanded so that petitioner, after full briefing and argument, has an opportunity to have the Ordinance judged against the standards of *Discovery Network*; petitioner was not provided that opportunity by the court below.

B. The Takings Issue in This Case Warrants Review

1. In arguing against review of the takings issue presented in the petition, Durham recognizes that the decision of the court below to aggregate *all* of petitioner's billboards in the Durham metropolitan area into a larger unit for purposes of the takings inquiry is a highly questionable one which it delicately labels a "confused analytical approach." Br. in Opp. 18. But Durham insists that the decision below rested on two independent and

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[4] Durham is wrong in contending (Br. in Opp. 16) that the record is somehow inadequate for resolution of the First Amendment issue presented here. Our argument is a purely legal one: that the court below erred in holding that a sign regulation necessarily is constitutional so long as it does not discriminate against noncommercial speech. It therefore is not surprising that the City fails to point to point to any issue, relevant to the disposition of the case, that is not illuminated by the existing record. It may be added that, as the Court repeatedly has held, "the party seeking to uphold a restriction on commercial speech carries the burden of justifying it." *Bolger* v. *Youngs Drug Products Corp.*, 463 U.S. 60, 71 n.20 (1983). See *Discovery Network*, 113 S. Ct. at 1510. If the City failed to introduce evidence that somehow would have established the constitutionality of its regulation, the Ordinance should be struck down; Durham's failure to carry its burden should not be rewarded with the denial of review.

alternative grounds: *first*, that petitioner's separate pieces of property could be aggregated into one unit; and *second*, that use of an "amortization period" justified the Ordinance because it permitted petitioner to recoup some of its investment. Because, on this hypothesis, the holding relating to the unit of property was unnecessary to the decision below, Durham contends that denial of review is justified. Br. in Opp. 17-19, 27.

This argument rests on a patent misreading of the decisions below. In its first opinion in this case, the court of appeals identified as a crucial, threshold issue "the designation of the appropriate unit of [petitioner's] property affected by the ordinance." Pet. App. 27a-28a. The court of appeals therefore directed the district court on remand to identify the proper unit of property, guided by the caveat that "[c]learly the unit is not composed of the affected billboards, which, like the coal pillars in *Keystone* [*Bituminous Coal Ass'n* v. *DeBenedictis*, 480 U.S. 470 (1987)], do not constitute a separate segment of property for taking purposes." Pet. App. 28a. It was this determination as to the unit of property that permitted the court of appeals to reject — without any reference to an amortization period — petitioner's argument that the Ordinance worked a taking by "deny[ing] [petitioner] all use of its property." "Instead," the court held, "like the statute upheld in *Keystone*, * * * [the Ordinance] directly affects only a part of the property." *Id.* at 31a.

The court of appeals went on to explain that the *next* step of the analysis

> is to determine whether the ordinance denies [petitioner] economically viable use of the appropriate unit of its property by considering the following factors identified in *Penn Central* [*Transportation Co.* v. *New York*, 438 U.S. 104, 124 (1978)]: (1) The "economic impact of the regulation on the claimant," (2) the "extent to which the regulation has interfered with distinct investment-backed expectations," (3) the "character of the governmental action."

Pet. App. 29a. The amortization period, the court concluded, comes into play only at the *end* of the analysis as "one of the facts that the district court should consider in defining the character of

governmental action, which is the third factor mentioned in *Penn Central*." *Id.* at 29a-30a.[5]

The district court faithfully applied this holding on remand. It began by ruling that the relevant unit of property was the set of all of petitioner's signs in the Durham metropolitan area, implementing the court of appeals' holding that the individual signs "'do not constitute a separate segment of property for taking purposes.'" Pet. App. 9a (citation omitted). The district court then made factual findings related to, among other things, the percentage of signs affected by the Ordinance compared to those remaining in petitioner's "business unit" and the "relative value of affected and remaining signs." Pet. App. 14a-15a.

Against this factual background, the court reasoned that "[t]he Durham ordinance must be evaluated in light of its impact on the entire set of [petitioner's] property interests. [Petitioner] retains the use of 126 of 232, or 54%, of its signs in the Durham metro market." Pet. App. 18a. As for the amortization period, the court indicated that it was simply one factor that "may be taken into account in considering the economic impact of the regulation." *Ibid.* But the existence of an amortization period was not regarded as a critical — and certainly not as an independently dispositive — factor by the courts below. To the contrary, the district court expressly acknowledged that the crucial determination in the case was the finding "that each individual sign does not constitute a separate unit of property. If it did, the *Lucas* inquiry into the nature of [petitioner's] title could be determinative." *Id.* at 21a n.7. The district court's holding, like that of the court of appeals, thus turned ultimately on the conclusion that a taking would not occur because the Ordinance would not deprive petitioner of "all

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[5] Durham maintains that review should be denied because "the final decision on the taking issue is merely an unpublished memorandum opinion." Br. in Opp. 9. But the holding of the court of appeals on the unit of property issue, which is quoted in text, was first stated in its initial, *published* opinion. As we explained in the petition (at 17), petitioner did not seek review of that decision at the time it was rendered because it was interlocutory.

economically viable use of its property interests *as a whole*." *Id.* at 20a-21a (emphasis added).

2. Durham's halfhearted attempt to defend the merits of the holding below regarding the unit of property is wholly unconvincing. The decisions of this Court cited by the City (at Br. in Opp. 26) stand only for the proposition that "'taking' jurisprudence does not divide a *single* parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated." *Penn Central*, 438 U.S. at 130-131 (emphasis added). But as we explain in the petition (at 23-24), that principle provides no support for the astounding conclusion, reached by the courts below, that *separate* pieces of property may be combined into a single unit for purposes of the takings inquiry.[6]

3. In addition, Durham is wrong in asserting (Br. in Opp. 20-24) that use of an amortization period to vitiate a taking would be noncontroversial. To the contrary, adoption of that rationale would have important and profoundly disturbing implications for regulatory takings doctrine; to the extent that Durham is correct in its contention that the courts below relied on the existence of an amortization period in rejecting petitioner's takings argument, the City has not made out a case for denial of review. The City itself recognizes (*id.* at 21) that, as we explained in the petition (at 27), several courts have rejected the proposition that an amortization period may render noncompensable state action that otherwise would work a taking. And the City is incorrect in contending (Br. in Opp. 21 & n.8) that these decisions rested on state constitutions. The opinion in *Ailes* v. *Decatur County Area Planning Comm'n*, 448 N.E.2d 1057, 1059-1060 (Ind. 1983), makes no mention of the

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[6] The decisions of lower courts cited by Durham (Br. in Opp. 26) also are inapposite. They involve either arguments about the availability of so-called "severance damages" to property that has not been taken (see *Georgia-Pacific Corp.* v. *United States*, 640 F.2d 328, 337 (Ct. Cl. 1980); *United States* v. *Honolulu Plantation Co.*, 182 F.2d 172 (9th Cir. 1950)), or takings of one (or more) of a set of contiguous parcels of land. See *Ciampitti* v. *United States*, 22 Ct. Cl. 310, 318 (1991); *Deltona Corp.* v. *United States*, 657 F.2d 1184, 1192-1193 (Ct. Cl. 1981); *Jentgen* v. *United States*, 657 F.2d 1210, 1213-1214 (Ct. Cl. 1981).

Indiana Constitution and plainly was premised on federal law. While other decisions cited in the petition did involve state constitutional provisions that mirrored the Fifth Amendment, the state courts in those cases relied on this Court's takings jurisprudence in finding that takings had occurred. See *Lamar Advertising of South Georgia, Inc.* v. *City of Albany*, 389 S.E.2d 216, 217 & n.1 (Ga. 1990) (citing *Agins* v. *City of Tiburon*, 447 U.S. 255, 260 (1980), and *Nollan* v. *California Coastal Comm'n*, 483 U.S. 825 (1987)); *Hoffman* v. *Kinealy*, 389 S.W.2d 745, 753 (Mo. 1965) (en banc) (citing *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393 (1922)).

By the same token, Durham is incorrect in asserting (Br. in Opp. 23-24) that its amortization theory may be reconciled with this Court's decisions. We explained in the petition (at 28) that the City's approach cannot be squared with this Court's reasoning in *First English Evangelical Lutheran Church* v. *County of Los Angeles*, 482 U.S. 304 (1987); the City makes no response. Nor can reliance on an amortization period to vitiate a taking be reconciled with the "categorical" rule that a taking occurs when "regulation denies all economically beneficial or productive use" of property. *Lucas* v. *South Carolina Coastal Council*, 112 S. Ct. 2886, 2893 (1992).[7]

4. Finally, Durham is wrong in its peculiar argument that the record here is inadequate for resolution of the takings issue because the stipulations on which the district court relied in making its factual findings were "available for consideration against the City on the City's motion that there was no taking, but were not available in Petitioner's favor on whether there was a taking since Petitioner had not requested summary judgment on this issue." Br. in Opp. 28. This contention is explicable only as a desperate attempt to generate uncertainty about the factual record because

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[7] Even if Durham is correct in its unlikely contention that the Takings Clause has nothing to say about regulations that "destroy[] the usefulness of business-related property" other than land (Br. in Opp. 23), that does the City no good here; the Ordinance renders economically useless both petitioner's leaseholds in real estate and its substantial physical structures on those leaseholds. See Pet. 6, 17.

Durham has so little to say about the law. But the argument is, on its own terms, nonsensical. The question before this Court is whether the City's motion for summary judgment on the takings issue was properly granted -- and Durham acknowledges that the stipulations in the record were available "for consideration against the City on the City's motion." In fact, the findings here are unusually detailed, making this case an especially suitable vehicle for resolving the question presented: whether a regulation that denies the owner *all* economically beneficial use of particular pieces of property may be held not to effect a merely taking because the owner also has other property that is devoted to a common or related use. That issue plainly warrants review.

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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